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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10
11 DIRECTORY ASSISTANTS, INC.,

12 Plaintiff,

13 vs.

14 DOES 1-10,

15 Defendants.

16 NO.

17 [Pending in the United States District
Court of the District of Connecticut,
Case No. 3:11cv00801-MRK]

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26 **PLAINTIFF'S MOTION TO
COMPEL COMPLIANCE WITH
SUBPOENA TO XCENTRIC
VENTURES, LLC**

Plaintiff Directory Assistants, Inc. ("Directory Assistants"), pursuant to Rule 45, Fed.R.Civ.P., requests that this Court compel third party Xcentric Ventures, LLC ("Xcentric"), the company that operates RipOffReport.com, to produce documents requested in the Subpoena To Produce Documents, Information, or Objects or to Permit Inspection of Premises In A Civil Case issued on May 24, 2011. Directory Assistants requests that RipOffReport.com be ordered to produce the documents within five days from the Court's order. Directory Assistants also requests that it be awarded its reasonable attorneys' fees and costs incurred in connection with this Motion.

This Motion is supported by the accompanying Memorandum of Facts and

1 Authorities and the exhibits thereto, including the Certificate of Counsel, which is
2 attached as Exhibit "1" and is incorporated by this reference, pursuant to Rule 37(a)(1),
3 Fed. R. Civ. P.

4 RESPECTFULLY SUBMITTED this 23rd day of August, 2011.

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MEMORANDUM OF FACTS AND AUTHORITIES

2 Directory Assistants, Inc. ("Directory Assistants") has a lawsuit (the "John Doe
 3 Lawsuit") pending against an unknown defendant who posted false and misleading
 4 statements about Directory Assistants on the Arizona-based website RipOffReport.com.¹
 5 On May 24, 2011, Directory Assistants served a subpoena (the "Subpoena") on Xcentric
 6 Ventures, LLC ("Xcentric"), the company that operates RipOffReport.com, seeking
 7 information to identify the anonymous poster. (Exhibit 2.) The subpoena required
 8 Xcentric to respond by June 10, 2011. Xcentric's counsel objected to the Subpoena by
 9 letter dated June 13, 2011 and refused to provide the requested information. Directory
 10 Assistants now moves for an order compelling Xcentric to comply with the Subpoena.

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I. BACKGROUND.

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A. Directory Assistants' Business.

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14 Directory Assistants is an advertising consulting agency that specializes in helping
 15 businesses make better choices in their directory advertising purchases. (See Affidavit of
 16 Michael Cody in Support of Plaintiff's Emergency Motion for Expedited Discovery
 17 ("Cody Aff.") in the John Doe Lawsuit, attached as Exhibit 3, at ¶ 3.) It has worked with
 18 thousands of satisfied customers from large and small businesses across the country. (*Id.*
 19 at ¶ 4.) Directory Assistants uses its knowledge and experience to help its clients
 20 determine whether they should retain their present directory advertising program or make
 21 cost-saving changes. (*Id.* at ¶ 5.) Directory Assistants empowers its customers to make
 22 more informed decisions and places them on a level playing field with their directory sales
 23 representatives. (*Id.* at ¶ 6.) It helps its customers understand what makes directory
 24 advertising effective, encouraging them to consider factors that they may never have
 25 considered before. (*Id.* at ¶ 7.)

26

¹ That lawsuit is pending in the United States District Court for the District of Connecticut and is captioned *Directory Assistants, Inc. v. John Doe*, Civ. No. 3:11cv00801-MRK.

1 Directory Assistants earns its money through contingency fee arrangements with its
 2 customers. (Cody Aff. at ¶ 8.) Under these contracts, the customer agrees that it will pay
 3 Directory Assistants a fixed percentage of its savings on its directory advertising for a
 4 certain number of years. (*Id.* at ¶ 9.) Directory Assistants' customers do not pay any up-
 5 front fee. (*Id.* at ¶ 10.) They are free to cancel with no obligation at any time prior to
 6 receiving information and advice from Directory Assistants. (*Id.* at ¶ 11.) Directory
 7 Assistants also provides a "performance guarantee" under which a customer may cancel
 8 its contract with no obligation if Directory Assistants is not able to show that customer
 9 how to save at least 40% on its directory advertising. (*Id.* at ¶ 12.) If a customer discloses
 10 pre-existing plans to change its directory advertising before signing the contract, it will
 11 not owe Directory Assistants any fee for the savings achieved by virtue of those pre-
 12 existing plans. (*Id.* at ¶ 13.) And, the customer can hear Directory Assistants' cost-saving
 13 advice and then decide not to make any changes to its directory advertising. (*Id.* at ¶ 14.)
 14 In that case, the customer will not owe Directory Assistants any fee. (*Id.*) Directory
 15 Assistants provides these options to its customers because it is confident that it can
 16 provide cost-saving advice that its customers will want to follow. (*Id.* at ¶ 15.)

17 **B. The Defendant's False and Misleading Posts.**

18 The unknown defendant posted false and misleading statements about Directory
 19 Assistants on two websites in April 2011. The posts included the same text:

20 **Directory Assistants Inc David Ford, Dan Cassain Do Not Sign a
 21 Contract with this Company Glastonbury, Connecticut**

22 Do not sign a contract with this company. Once you sign the contract you
 23 are not a customer, but a victim of their contract. They won't help you
 24 lower your ad costs. They will only tell you to reduce the size of your ad
 25 and when you do or make any changes at all they will charge you
 26 exorbitant [sic] and outrageous fees. Dan C. is the good cop. He looks
 nice and is professional. Once they get you to sign, then you will be dealing
 with David Ford who sounds like a mafia kingpin. He will threaten to take
 you to court if you don't pay exorbitant [sic] fees. Their contract is full of
 deceptive devices that work in their favor.

1 (See Cody Aff. ¶¶ 20-21, Exs. A & B.) The unknown defendant posted these statements
 2 on www.ScamInformer.com using the alias "USER239330" and on
 3 www.RipOffReport.com using the alias as "Andrew (Knoxville Tennessee United States
 4 of America)." (*Id.*) Scam Informer's and Ripoff Report's terms of use indicate that the
 5 website operators do not voluntarily disclose the identity of people who post on their sites.
 6 (*Id.* at ¶ 22.)

7 The unknown defendant's false, misleading, and disparaging statements have
 8 caused tangible injury to Directory Assistants. (Cody Aff. at ¶ 25.) As a result, Directory
 9 Assistants has spent time and money responding to questions and concerns about the
 10 veracity of the defendant's allegations from prospective customers—and there are likely
 11 other customers and prospective customers who have chosen not to do business with
 12 Directory Assistants based on the defendant's statements without even giving Directory
 13 Assistants the opportunity to defend itself. (*Id.*) Directory Assistants has incurred costs
 14 monitoring the internet for other false and disparaging posts, and it is now incurring legal
 15 fees to prosecute this lawsuit. (*Id.*) These quantifiable damages are the direct result of the
 16 defendant's false and misleading statements.

17 **C. The John Doe Lawsuit.**

18 Directory Assistants filed a Verified Complaint in the John Doe Lawsuit on May
 19 16, 2011. A true and correct copy of the Verified Complaint is attached as Exhibit 4. It
 20 sets forth the unwarranted smear campaign that Directory Assistants has endured, quoting
 21 and identifying the defendant's many false and misleading statements about Directory
 22 Assistants. The Verified Complaint alleges tortious interference claims and seeks
 23 damages and permanent injunctive relief.

24 Directory Assistants filed a motion for expedited discovery in the John Doe
 25 Lawsuit on May 20, 2011. (Ex. 3.) The Connecticut court granted that motion on May
 26 23, 2011. A true and correct copy of that order is attached as Exhibit 4.

1 Directory Assistants issued the Subpoena on May 24, 2011. (Ex. 2.) The
 2 Subpoena required Xcentric to comply by June 10, 2011. (*Id.*) The Subpoena requested
 3 information necessary to identify the anonymous poster. (*Id.*) Xcentric objected to the
 4 Subpoena by letter dated June 13, 2011 and refused to comply with the Subpoena. A true
 5 and correct copy of Xcentric's June 13, 2011 letter is attached as Exhibit 6.

6 **II. LEGAL STANDARD.**

7 A party must satisfy five requirements to compel compliance with a subpoena in
 8 connection with anonymous internet postings. Those five requirements are: "(1) a
 9 concrete showing of a *prima facie* claim of actionable harm; (2) the specificity of the
 10 discovery request; (3) the absence of alternative means to obtain the subpoenaed
 11 information; (4) a central need for the subpoenaed information to advance the claim; and
 12 (5) the Doe defendants' expectation of privacy." *Best Western Intern., Inc. v. Doe*, 2006
 13 WL 2091695, *4 (D. Ariz. 2006). Here, for the reasons contained herein, Directory
 14 Assistants has satisfied each factor.

15 **III. ARGUMENT.**

16 The First Amendment right to anonymous Internet speech is not absolute.
 17 *Ecommerce Innovations LLC v. Does 1-10*, 2008 U.S Dist. Lexis 99325, *3 (D. Ariz. Nov.
 18 25, 2008). The First Amendment does not give a person the right to engage in libel or
 19 misleading or commercial speech. *See Mobilisa, Inc. v. John Doe I*, 170 P.3d 712, 717
 20 (Ariz. Ct. App. 2007) (collecting cases). To obtain the identity of an anonymous poster, a
 21 party must show that its cause of action against the anonymous poster could survive a
 22 motion for summary judgment on elements not dependent on the speaker's identity.
Ecommerce Innovations, LLC, 2008 U.S Dist. Lexis 99325 at *3.² Placing this burden on

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² Directory Assistants addressed a more comprehensive standard in its Emergency Motion
 25 for Expedited Discovery. (Ex. 3.) The District of Connecticut has adopted a 6-part test to
 26 determine whether to unmask an anonymous defendant. *See Doe I v. Individuals Whose
 True Names Are Unknown*, 561 F. Supp. 2d 249, 254-55 (D. Conn. 2008) (Droney, J.).

1 the requesting party "furthers the goal of compelling identification of anonymous internet
 2 speakers only as a means to redress legitimate misuses of speech rather than as a means to
 3 retaliate against or chill legitimate uses of speech." *Id.* at *3-4.

4 Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment
 5 "shall be rendered forthwith if the pleadings, depositions, the discovery and disclosure
 6 materials on file, and any affidavits show that there is no genuine issue as to any material
 7 fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.
 8 P. 56(c). A party moving for summary judgment has the initial burden of showing that no
 9 genuine issue of material fact exists and that it is entitled to judgment as a matter of law.
 10 *See Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). The burden then shifts to
 11 the non-moving party to come forward with material facts sufficient to create a triable
 12 issue of fact. *See id.* at 247-48. There is no genuine issue precluding summary judgment
 13 unless there is "material evidence sufficient to generate a genuine dispute of fact for trial."
 14 *Anderson*, 477 U.S. at 248; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

15 The party opposing summary judgment "may not rest upon the mere allegations or
 16 denials of [the party's] pleading, but . . . must set forth specific facts showing that there is
 17 a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law at issue determines
 18 which facts are "material," and only disputes over factual issues which might affect the
 19 outcome of the action under the applicable law can create a genuine dispute sufficient to
 20 preclude entry of summary judgment. *See Anderson*, 477 U.S. at 248.

21 Directory Assistants alleged two tort claims against the defendant in the John Doe
 22 Lawsuit – tortious interference with contractual relations and tortious interference with
 23 business expectancies. "A claim for tortious interference with contractual relations

24 To the extent that this Court applies this standard or considers any of those factors in
 25 deciding this motion to compel, Directory Assistants relies on the facts and arguments set
 26 forth in its Emergency Motion for Expedited Discovery (Ex. 3, hereto) as support for this
 motion to compel.

1 requires the plaintiff to establish (1) the existence of a contractual or beneficial
 2 relationship, (2) the defendants' knowledge of that relationship, (3) the defendants' intent
 3 to interfere with the relationship, (4) the interference was tortious, and (5) a loss suffered
 4 by the plaintiff that was caused by the defendants' tortious conduct." *Appleton v. Bd. of*
 5 *Educ.*, 254 Conn. 205, 213 (2000). The elements of a claim for tortious interference with
 6 business expectancies are: "(1) a business relationship between the plaintiff and another
 7 party; (2) the defendant's intentional interference with the business relationship while
 8 knowing of the business relationship; and (3) as a result of the interference, the plaintiff
 9 suffers actual loss." *Hi-Ho Tower v. Com-Tronics, Inc.*, 255 Conn. 20, 27 (2000). The
 10 attached Verified Complaint and affidavit shows that Directory Assistants could survive a
 11 motion for summary judgment on these claims.

12 Directory Assistants is an active business that has existing contractual relationships
 13 with its customers and regularly solicits new customers for its business. (Cody Aff. ¶¶ 3-
 14 15.) The anonymous defendant's postings show his or her knowledge of and intent to
 15 interfere with Directory Assistants' business relationships and business expectancies.³
 16 The title of the post warns: "Do Not Sign a Contract with this Company[.]" (Cody Aff.
 17 Exs. A, B.) The post begins with the same warning and then tells potential customers that
 18 after they sign a contract they "are not a customer, but a victim of their contract." (*Id.*)
 19 These statements show that the defendant knew that Directory Assistants had existing and
 20 potential contractual or beneficial business relationships. Even if the defendant denied
 21 such knowledge or intent, the language of the posts creates an issue of fact that would
 22 survive summary judgment. *Anderson*, 477 U.S. at 248.

23 The defendant's statements are tortious because they are false, misleading, and

24 ³ The content of the posts implies that the defendant is aware that Directory Assistants has
 25 actual and prospective contractual and business relationships. To the extent that proving
 26 actual knowledge is necessary to prevail on summary judgment of these claims, such
 proof requires the defendant's identity and subsequent factual investigation.

1 defamatory. *See QSP, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 359-360 (Conn.
 2 2001) ("Defamation or disparagement of a business' goods and services may be
 3 considered trade libel and is recognized by Connecticut and New York courts as a species
 4 of defamation."); *Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 217, 837 A.2d 759
 5 (2004) ("A defamatory statement is defined as a communication that tends to harm the
 6 reputation of another as to lower him in the estimation of the community or to deter third
 7 persons from associating or dealing with him...."). The defendant stated that Directory
 8 Assistants "will not help you lower your ad costs" and that they "will only tell you to
 9 reduce the size of your ad and when you do or make any changes at all they will charge
 10 you exorbitant [sic] and outrageous fees." These statements concern the heart of the
 11 Directory Assistants' services – helping customers make informed yellow page advertising
 12 decisions and reducing their customers' advertising costs – and show the defendant's intent
 13 to deter others from dealing with Directory Assistants.

14 Contrary to the defendant's assertion, Directory Assistants has helped thousands of
 15 customers reduce their ad costs. (*See* Affidavit of Michael Cody in Support of Motion to
 16 Compel ("2nd Cody Aff."), attached hereto as Ex. 7, ¶ 6.) It also does much more than
 17 simply tell customers to reduce the size of their ads. Directory Assistants educates its
 18 customers about yellow page advertising strategy, costs, and what kind of ads will provide
 19 the best return for the customer's advertising dollars based on the particular business the
 20 customer operates. (*Id.* at ¶ 5) Directory Assistants routinely teaches its customers about
 21 which directories to advertise in, sizes of ads, strategies, the existence and use of free
 22 listings, ad design, use of color ads, market plans, how yellow page publisher discounts
 23 work, how yellow page publishers charge for advertising, and whether it makes sense for
 24 that particular customer to advertise in the yellow pages at all. (*Id.*) Directory Assistants
 25 also assists its customers with placing ads with yellow page publishers, designing ads, and
 26 checking the ads for accuracy after they are published. (*Id.*) Directory Assistants'

1 contract lists these services, which are included as part of the fee that the customer pays.
 2 (*Id.* at ¶ 8.)

3 The defendant's statement that Directory Assistants' fees are outrageous and
 4 exorbitant creates a false impression that the customers do not know what Directory
 5 Assistants' fees will be. Directory Assistants' contract discloses the fees and gives the
 6 customer three fee options from which the customer chooses. (2nd Cody Aff. at ¶ 9.) The
 7 fees are a percentage of how much the customer saves on its yellow page advertising.
 8 (*Id.*) The customer owes nothing if it does not make any cost-saving changes to its ads
 9 after Directory Assistants provides its services. (*Id.*) The contract also includes a
 10 performance guarantee that allows the customer to terminate the contract if Directory
 11 Assistants does not show the customer how it can save at least 40% off its existing yellow
 12 page advertising. (*Id.*) Contrary to the defendant's statements, Directory Assistants
 13 informs its customers of how the fees are calculated and charges its customers the fees set
 14 forth in their contract.

15 The defendant's post also suggests that Directory Assistants charges its customers
 16 for changes that the customer made on its own. This is false. Directory Assistants asks
 17 every potential customer what, if any, changes that they intend to make to their ads before
 18 they sign a contract with Directory Assistants. (2nd Cody Aff. at ¶ 11.) The customer's
 19 "pre-disposed changes" are listed in the contract so that the customer does not get billed
 20 for changes that they intended to make before working with Directory Assistants. (*Id.*)
 21 The contract includes express terms explaining this procedure. (*Id.*)

22 The defendant also disparaged Directory Assistants' president by likening him to a
 23 "mafia kingpin" and stating that he "will threaten to take you to court if you don't pay
 24 exorbitant [sic] fees." (Cody Aff. ¶¶ 20-21, Exs. A & B.) The post concludes by
 25 declaring that Directory Assistants' "contract is full of deceptive devices that work in their
 26 favor." (*Id.*) The defendant's posts also show that the defendant intended to prevent

1 Directory Assistants from obtaining new customers and/or interfere with Directory
 2 Assistants' existing business relationships.

3 Directory Assistants has suffered actual loss as a result of the defendant's posts.
 4 Directory Assistants has spent significant time and money to address the posts and
 5 reassure concerned prospective customers that it is a worthy business partner. (Cody Aff.
 6 ¶¶ 24-25.) In addition, on May 10, 2011, Directory Assistants received copies of emails
 7 sent from a yellow pages publisher to one of Directory Assistants' prospective customers
 8 in Virginia. (*Id.* at ¶24; 2nd Cody Aff. ¶ 13.) These emails included links to, among other
 9 things, the posts that the defendant made on RipOffReport.com and ScamInformer.com.
 10 (*Id.*) The emails also encourage the yellow pages publisher's sales employees to send
 11 these links to any customers who discuss the possibility of hiring Directory Assistants.
 12 (*Id.*) After receiving these emails, the prospective customer in Virginia declined to do
 13 business with Directory Assistants. (*Id.*) Another prospective customer, Ingram Auto
 14 Parts in Virginia, also declined to do business with Directory Assistants after it received
 15 copies of these emails with the defendant's false statements. (2nd Cody Aff. at ¶ 14.)
 16 Directory Assistants does not know at this time how many more potential customer and
 17 prospective customer relationships have been affected by this conduct. (*Id.*)

18 These facts show that the unknown defendant posted false statements about
 19 Directory Assistants to interfere with Directory Assistant's existing and potential
 20 customers. Directory Assistants has suffered actual losses as a result of this conduct.
 21 These facts therefore satisfy the elements of Directory Assistant's claims against the
 22 unknown defendant in the John Doe Lawsuit and, at a minimum, would create factual
 23 issues that would survive summary judgment.

24 **IV. CONCLUSION.**

25 The unknown defendant posted false and defamatory statements about Directory
 26 Assistants on the Internet. The language of the posts shows that this person intended to

1 harm Directory Assistant's business. This Court should order Xcentric Ventures to
2 comply with the Subpoena and provide the information necessary for Directory Assistants
3 to identify the unknown defendant so that it can pursue redress in the John Doe Lawsuit.

4 RESPECTFULLY SUBMITTED this 23rd day of August, 2011.

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